86-290

SUPREME COURT, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

NIKOLA KONSTANTINOV,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (85-2660)

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's holding—that the defense of entrapment is precluded by defendant's predisposition, not to commit the drug crime at issue,[1] but to commit a financial crime[2] with which he was not charged—conflicts with decisions from other Circuits,[3] and with controlling precedent of this Court,[4] respecting the "lack of predisposition" element of entrapment.

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[1] Defendant was convicted of delivery of .14 (fourteen hundredths) of a gram of heroin to Drug Enforcement Administration [hereafter DEA] Agent Perez.

Defendant, age 42, had no prior narcotics record. He testified—without rebuttal or contradiction—that he never bought, sold, used or possessed narcotics in his life, other than the .14 of a gram in this case. (Tr. 85-86) Agent Perez testified the DEA had no narcotic file on defendant. (Tr. 34-35)

Here and hereafter: "R." refers to the Record on Appeal in No. 85-2260, and "Tr." to the Transcript of Proceedings at Trial in No. 84 CR 235, which is a part of said Record.

[2] Per defendant's uncontradicted testimony, if Perez had given him money supposedly for the purchase of drugs or for supposed "laundering," defendant intended to abscond with the money and not deliver any heroin. (Tr. 84; see Tr. 64-65, 119, 122.) In other words, defendant was predisposed to "take the money and run."

[3] See, *e.g.*, *United States* v. *Lard*, 734 F.2d 1290 (8 Cir. 1984); *United States* v. *Dion*, 762 F.2d 674 (8 Cir. 1985); *United States* v. *Nations*, 764 F.2d 1973 (5 Cir. 1985); *United States* v. *McLernon*, 746 F.2d 1098 (6 Cir. 1984); *United States* v. *Borum*, 584 F.2d 424 (D.C. Cir. 1978).

[4] *Sherman* v. *United States*, 356 U.S. 369 (1958), and *Sorrells* v. *United States*, 287 U.S. 435 (1932), both reaffirmed in *United States* v. *Russell*, 411 U.S. 423 (1973).

2. Whether certiorari should be allowed so that this Court may clarify that the "predisposition" aspect of entrapment extends only to defendant's mental state with respect to the particular crime charged.

3. Whether, per proper "predisposition" criteria, the evidence at bar established entrapment as a matter of law, regardless of any issues of witness credibility.

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Nikola Konstantinov, was the defendant in the District Court for the Northern District of Illinois, Eastern Division (84 CR 235), and appellant in the Court of Appeals for the Seventh Circuit (85-2260). Respondent, United States of America, was plaintiff in the District Court, and appellee in the Court of Appeals.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

NIKOLA KONSTANTINOV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (85-2660)

Petitioner, Nikola Konstantinov (hereafter, defendant), prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming his conviction and sentence for distributing .14 of a gram of heroin in violation of 21 U.S.C. 841(a)(1).

Judgment and Order Below

The Order of the Court of Appeals for the Seventh Circuit, unpublished per Circuit Rule 35, No. 85-2260, is set out as Appendix A.

Jurisdictional Statement

On June 25, 1986, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, in an Order, unpublished per Circuit Rule 35. (App. A) Defendant's timely Petition for Rehearing was denied on August 13, 1986. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The statute which defendant was convicted of violating is 21 U.S.C. 841(a)(1), distribution of heroin. There is no issue as to interpretation or application of the statute; the sole issue at bar involves the defense of entrapment.

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged with distribution of .14 of a gram of heroin, in violation of 21 U.S.C. 841(a)(1).

Defendant interposed the defense of entrapment, both during trial, and in his post-trial Motion to Vacate Conviction or Grant a New Trial. (R. 5) The court found him guilty, and sentenced him to 5 years probation with the first six months in custody. (R. 5, 139)

The Court of Appeals affirmed, (App. A), and denied rehearing. (App. B)

Jurisdiction of Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant was charged with having committed an offense against the United States, to wit, 21 U.S.C. 841(a)(1).

Statement of Facts

[In support of defendant's position that the evidence establishes entrapment as a matter of law, the following operative facts are undisputed; and defendant's testimony is uncontradicted and unrebutted. Even taking only the government's evidence as true (and discounting defen-

dant's testimony),[5] the evidence establishes entrapment *per se*.]

* * *

DEA Agent Perez was introduced to defendant by female government informant "Carmen" on October 8, 1982. (Tr. 23, 26) "Carmen" was present on this occasion and on one subsequent occasion when narcotics were discussed. (Tr. 28-29) Each meeting was instigated by Agent Perez; each discussion of narcotics was instigated by Agent Perez. (Tr. 23, 26, 28-29, 36, 50, 56, 58, 87) For some 5 months after the initial meeting, Perez kept contacting defendant, importuning defendant to procure heroin for him. (Tr. 36-37, 47-48, 56, 63, 87, 101-02) Although defendant kept saying [in substance], I don't deal and don't know where I can get any, (see Tr. 7, 29, 50, 56),[6] he told Perez that he would try to get some for him. (Tr. 7, 58, 74, 88, 130) During this time, Agent Perez was inducing defen-

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[5] According to the Court of Appeals, "The district judge rejected Konstantinov's testimony regarding the source of the heroin . . . . The court found that at the very least Konstantinov had delivered the heroin in order to con Perez out of a large amount of money." Order, App. A, p. 5. Thus, the district judge necessarily believed at least a portion of defendant's testimony. But, even assuming (*arguendo*) that his testimony is not credible, the government's evidence itself establishes entrapment as a matter of law.

[6] Such is the gist and substance of defendant's continuing response to Agent Perez, from their first meeting on October 8, 1982 until the last week in April, 1983. (See Tr. 130.) For example, on cross-examination of Agent Perez:

"Q. [by defense counsel] He [Konstantinov] told you he didn't deal in narcotics, he had nothing to do with narcotics, isn't that right?

A. [Agent Perez] That's right." (Tr. 29)

dant with promises of colossal sums of money. (Tr. 30-32, 64-65, 92-93) Perez told defendant that he [Perez] had some fifty million dollars that needed to be transferred out of the country. (Tr. 64-65; see Tr. 119, 122; App. A, pp. 2 & 4.)

Defendant, at age 42, had absolutely no prior record respecting narcotics. Agent Perez testified that the DEA had no narcotic file on defendant. (Tr. 34-35) And, per defendant's uncontradicted and unrebutted testimony, he never bought, sold, used or possessed narcotics in his entire life, aside from the "sample" in this case.[7] He tried to keep Agent Perez interested by telling him that he would try to get some heroin for him, though he did not in fact have a heroin source, because he wanted to gain access to Perez' alleged gargantuan supplies of money. (Tr. 83-85, 88, 93, 97, 116-18, 130; see fn. 5, *supra*, quoting Court of Appeals (App. A, p. 5) summarizing district judge's findings: "The court found that at the very least Konstantinov had delivered the heroin in order to con Perez out of a large amount of money."

Defendant wanted to borrow money from Perez to complete repairs to a restaurant, (Tr. 44-45, 91-92, 102), and even propositioned Perez to go into the carpet business with him—with Perez' money to be used for investing in said business. (Tr. 101)

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[7] Defendant was arrested in March of 1984, about a year after the single delivery. (Tr. 59, 64, 113) Although Perez repeatedly tried to contact defendant after the single delivery, he was thereafter unable to reach him. (Tr. 63-64)

There was no evidence whatsoever from which it could have been inferred that defendant was predisposed to commit any narcotics offense.[8]

After about five months of importuning by Perez and lulling by defendant, defendant fortuitously came into possession of a small packet of heroin—.14 [fourteen hundreths] of a gram—which he delivered to Agent Perez on April 29, 1983. (Tr. 18-19, 58-59, 109) This was a "free sample" for which defendant did not receive any compensation. (Tr. 59, 109) Defendant obtained the packet on April 25, 1983, and coincidentally, the next day on April 26, 1983, Agent Perez again called defendant, after not having called him for about the previous month.[9] Perez asked, "Do you have anything?" Defendant answered, "Some came in yesterday." (Tr. 104-05) The delivery occurred on April 29, 1983. (Tr. 58-59)

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[8] For the Court of Appeals' summary of the evidence as to entrapment, see App. A, pp. 2-4, and its condensation of same, App. A, p. 6, reproduced for the Court's convenience in the following Argument, pp. 9-10, *infra*.

[9] As to the alleged "source" of the heroin defendant delivered, though the district judge disbelieved defendant, it is interesting to note that defendant testified that on April 25, 1983, an unidentified Mexican approached defendant at Montrose & Kedzie (Chicago), site of a store defendant was remodeling, and attempted to sell defendant some jewelry; defendant stated he was not interested. Then the Mexican offered him heroin, giving him the .14 gram small tinfoil packet as a "sample." (Tr. 103-04) [This was the "sample" defendant delivered to Perez on April 29, 1983.] Curiously, the day after defendant claimed he had thus acquired the "sample," on April 26, 1983, Agent Perez—after having left defendant alone for approximately a month—again began importuning him to deliver heroin. (Tr. 104)

Other than the "sample," defendant did not thereafter deliver any additional heroin.[10]

Defendant testified that if the agent had given money to him, he would have absconded with the money and not delivered any heroin to him. (Tr. 84)

The District Court disbelieved defendant's testimony as to the source of the heroin, but found "that at the very least Konstantinov had delivered the heroin in order to con Perez out of a large amount of money." (App. A, p. 5, summarizing District Court's findings.)

As to predisposition, the District Court relied in part on a tape-recorded conversation in which defendant participated. (Tr. 151[11]; G. Ex. 2 & 4) (See App. A, pp. 2 & 4 discussing tape-recorded conversation.) In the course of the tape recording, defendant used certain drug terminology; however, per Agent Perez, the prices defendant was quoting did not seem appropriate. (See G. Ex. 4, pp. 14-15.)[12]

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[10] Defendant's failure to supply any further drugs [though Perez repeatedly (unsuccessfully) tried to contact defendant after the single delivery, (Tr. 63-64)], corroborates that defendant had no drug source. (See Tr. 59, 64.)

[11] Per the District Court, the tape recording demonstrates that "the transaction is clearly one . . . of a willing participant in a delivery of heroin." (Tr. 151) This conversation was recorded April 26, 1983, three days prior to the actual, single delivery, and over six months after Perez met and began importuning defendant.

[12] While not determinative of any issue herein, it is interesting to note that the quality of the fourteen-one-hundredth of a gram "free sample" was "no good," per defendant's unrebutted testimony as to what "Mario" [a/k/a Agent Perez] said about it. (Tr. 110, 125) Per the government chemist's stipulated evidence, it was of 4.9% purity, (Tr. 19), which the prosecutor acknowledged was "hardly high quality material." (Tr. 148) (See App. A, p. 3.)

REASONS FOR GRANTING THE WRIT

The decision below—that the defense of entrapment was precluded by defendant's predisposition, not to commit the drug crime at issue, but to commit a financial crime with which he was not charged—conflicts with decisions from other Circuits, and with controlling precedent of this Court, respecting the "lack of predisposition" element of entrapment.

Certiorari should be allowed so that this Court may clarify that the "predisposition" aspect of entrapment extends only to defendant's mental state with respect to the particular crime charged.

Applying the proper "predisposition" criteria, the evidence at bar—even according to the government's evidence—established entrapment as a matter of law.

Synopsis of Argument

"Predisposition" focuses on defendant's initial willingness to commit the crime with which he is charged. Predisposition to commit a financial crime (with no evidence of predisposition to commit a drug crime) does not defeat the defense of entrapment as to the drug crime, respecting which it is undisputed that the government agent initiated the transaction.[13] The Seventh Circuit, by holding that a general criminal predisposition amounts to that predisposition which defeats the entrapment defense, has departed from this Court's precedent and brought itself into conflict with other Circuits. (See fns. 3 & 4, p. i, *supra.*)

The tape-recorded conversation some three days prior to delivery, and some six months after the Agent began

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[13] Per the Court of Appeals: "The record conclusively demonstrates that it was the government agent who initiated the unlawful activity." (App. A, p. 6)

importuning defendant to deliver heroin, cannot properly be used to demonstrate "predisposition", because this conversation itself was the product of the continual, long-term government inducement. Moreover, the rhetoric used by defendant respecting drug terminology cannot properly be used to demonstrate predisposition, considering the agent's testimony as to the inappropriateness of the prices defendant was quoting.

Precepts of due process of law, which underlie the entrapment defense, demand that the principles laid down in the landmark decisions of *Sorrells* v. *United States,* 287 U.S. 435, 77 L.Ed. 413 (1932), and *Sherman* v. *United States,* 356 U.S. 369, 2 L.Ed.2d 848 (1958), be followed; pursuant to which principles, and applying the appropriate criteria respecting "predisposition," in the instant case, the evidence established entrapment as a matter of law—even taking the entirety of the government's case as true.

ARGUMENT

In its condensation of defendant's entrapment defense, the Court of Appeals' summary of the facts is weighty support for our position that entrapment has been established as a matter of law:

> "Konstantinov argues that he was not predisposed to commit the crime, pointing out that this case involves a *single delivery.* Also Konstantinov had *no prior record,* and in fact, as Perez admitted in his testimony, he did not have a narcotic file at the drug agency. *Nor did the government present any evidence of the character or reputation of Kontantinov from which the court below could have found predisposition.* He also emphasizes that he derived absolutely no profit whatsoever from the single delivery. *The record conclusively demonstrates that it was the*

> *government agent who initiated the unlawful activity.* Also, it was only after several personal visits and numerous phone calls for an almost seven month period in which Perez continued to ask him whether he had found a drug source, that Konstantinov delivered the heroin. Further, the inducement offered by the government was the expectation of receiving a large amount of money. Konstantinov also argues the taped phone conversation does not show a detailed understanding of narcotics dealings. *In addition, despite repeated requests Konstantinov never again distributed narcotics or engaged in any other criminal act.*" (App. A, p. 6) (Emphasis added.)

Nonetheless, and despite its further concession that "This is an unusual case involving several close questions," (App. A, p. 8), the Seventh Circuit affirmed defendant's conviction:

> "[C]onsidering all the circumstances as well as the deference to be accorded the district court as trier of fact, we cannot find reversible error." (App. A, p. 8)

Only by falling back on the false premise of "witness credibility"—which is irrelevant in this case—and by focusing on a predisposition to criminality other than respecting the drug crime at issue, could the Court of Appeals affirm.

Although paying lip service to the proper test of predisposition—*viz.*:

> "The entrapment defense focuses on the intent or predisposition of the defendant to commit *the* crime." (App. A, p. 5) (Emphasis added),

instead of proceeding to determine whether *this* defendant was predisposed to commit the *drug offense charged*, the Court of Appeals has precluded the entrapment de-

fense upon a showing that defendant was ready to "take the money and run." But the test is predisposition to commit "*the*" crime, not "*a*" crime of any variety.

That the definite article, "*the* crime," rather than the indefinite article, "*a* crime," is the definitive factor respecting predisposition, is clear from language of this Court, recently restated in a well-reasoned Eighth Circuit decision, reversing convictions upon finding entrapment as a matter of law:

> "The key question is . . . whether the government agent caused or induced the defendant to commit a crime he was not otherwise predisposed—*i.e.*, willing and ready—to commit whenever a propitious opportunity arose. . . . [citation omitted] As the Supreme Court has indicated, the principal focus of this inquiry is upon the 'intent or *predisposition of the defendant to commit the crime.*'" *United States* v. *Lard,* 734 F.2d 1290, 1293 (8 Cir. 1984), quoting from *United States* v. *Russell,* 411 U.S. 423, 429, 36 L.Ed.2d 366, 371 (1973). (Emphasis added.)

The Seventh Circuit's extension of the concept of predisposition to include a predisposition to commit *a* crime —here, a financial crime—whereas the entrapment decisions of this Court and all the other Circuits restrict this concept to a predisposition to commit *the* crime with which the defendant eventually is charged, is an unwarranted and unprecedented extension which should not go unrestricted by this Court. Such over-extension of "predisposition" conflicts with this Court's decisions in *Sherman* v. *United States,* 356 U.S. 369, 2 L.Ed.2d 848 (1958), and *Sorrells* v. *United States,* 287 U.S. 435, 77 L.Ed. 413 (1932), as reaffirmed in *United States* v. *Russell, supra.* Moreover, it brings the Seventh Circuit into conflict with each of the other Circuits—none of which

has ever held that a predisposition to commit a financial crime amounts to that "predisposition" which defeats the defense of entrapment as to a drug crime—where there is no showing of predisposition respecting drugs, and "The record conclusively demonstrates that it was the government agent who initiated the unlawful activity." (App. A, p. 6) See, *e.g.*, the following decisions, each, reversing upon a finding that the evidence showed entrapment as a matter of law, regardless of any questions of credibility: *United States* v. *Lard*, 734 F.2d 1290 (8 Cir. 1984); *United States* v. *Dion*, 762 F.2d 674 (8 Cir. 1985); *United States* v. *Nations*, 764 F.2d 1973 (5 Cir. 1985); *United States* v. *McLernon*, 746 F.2d 1098 (6 Cir. 1984); *United States* v. *Borum*, 584 F.2d 424 (D.C. Cir. 1978).

According to such long-standing entrapment law, the prosecution has the burden of establishing defendant's predisposition beyond a reasonable doubt. *Lard, supra,* 734 F.2d at 1294, n.3. Applying that standard to this case, no reasonable finder of fact "could have found beyond a reasonable doubt that . . . [defendant] was ready and willing to commit the crimes and that the agents did no more than afford him an opportunity to do so." *Id.* at 1294. There is no room for doubt as to this issue, given the undisputed facts at bar:

> "While law enforcement officials may use strategy, stealth, and even deception to catch the 'unwary criminal,' they may not arbitrarily select an otherwise law abiding person, gain his confidence, and then proceed to beguile or lure him to commit a crime he would not have otherwise attempted. It is the government's duty to prevent crime, not to instigate or create it." *Id.* at 1295.

Here, as in *Sorrells, supra,* and in *Lard, supra,* defendant committed the act of delivery "only upon the instigation and inducement of [the agent]," considering defendant's "lack of prior criminal record or dealings in [contraband]," and that his initial failure to commit an offense was broken down only after further, repeated solicitation and inducement by the agent. *Lard, supra,* at 1294-95.

That predisposition must be shown as to the precise crime as to which the defense of entrapment is interposed, is evident from this Court's opinion in *Sorrells, supra,* where the defense was upheld. Sorrells, convicted of unlawful sale of liquor, had no prior record, but three prosecution witnesses testified in rebuttal that defendant had "a general reputation as a rum runner"; however, "There was no evidence that the defendant had ever possessed or sold an intoxicating liquor prior to the transaction in question." *Sorrells, supra,* 287 U.S. at 441, 77 L.Ed. at 416. (conviction, reversed.)

A telling evidentiary detail militating against a finding of predisposition in this case is that defendant furnished no additional drugs after delivery of the .14 gm. sample to Perez. (See pp. 5 & 7, *supra.*) It has been recognized judicially that a defendant's single infraction, not followed by others, supports a finding of non-predisposition. See *United States* v. *Dion, supra.* There, the Eighth Circuit reversed one appellant's convictions for violations of the Migratory Bird Act, finding he had been entrapped as a matter of law. The reviewing court expressly noted: "Additional evidence of Dion's lack of predisposition is that he never again sold an eagle to government agents or to anyone else." *Id.* at 689.

Defendant's tape-recorded conversation with Agent Perez on April 26, 1983—three days prior to the single delivery, and over six months after their initial meeting (when Perez began beguiling and importuning defendant) —was relied on by the district court in finding predisposition, (Tr. 151), and noted by the Court of Appeals, (App. A, p. 7); in the district court's view, per this conversation, (G. Ex. 2 & 4), "the transaction is clearly one . . . of a willing participant in a delivery of heroin." (Tr. 151) However, what both courts have chosen to overlook, is that this conversation took place after defendant had already been cajoled, beguiled and bamboozled by Perez for over six months. Even if defendant may have been "a willing participant" at the time of delivery, (three days after said taped conversation), he became such only as a direct result of the continuing instigation by the DEA Agent. (See evidentiary facts, *supra.*) The same rationale applies here—but was ignored by the courts below—as is applicable to a series of deliveries, during the course of which the government inducement continues. In such cases—per this Court, in *Sherman, supra,* it does not even defeat an entrapment defense if there was *more* than a single delivery.[14] (Here, of course, there was but a single delivery—which took place only after more than six months of government inducement.) Considered in the light of such decisions, defendant's willingness to commit a delivery more than six months after the government inducement began, cannot be equated with an initial willingness such as would defeat an entrapment defense.

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[14] *Sherman* itself involved a series of sales. Moreover, while the defendant in *Sherman, supra,* had an extensive narcotics sales history, the Court held that considering the government's *repeated* requests and defendant's initial reluctance, Sherman was not predisposed. 356 U.S. at 373-74; see *Lard, supra,* at 1295.

Moreover, defendant's alleged, apparent "familiarity" with drug terminology obviously was more apparent than real, considering the evident confusion as to the street value of heroin, as opposed to cocaine; and additionally, the prices defendant was quoting did not seem appropriate, per Agent Perez. (See G. Ex. 4, pp. 14-15.)

Pursuant to the foregoing, the evidence at bar establishes beyond peradventure, by undisputed evidence, both that defendant was not predisposed to commit the drug offense, and that the Agent repeatedly importuned defendant over a long period of time, overcoming his resistance—and turning him into a lawbreaker—with [false] promises of huge financial rewards. Thus, the undisputed evidence establishes entrapment as a matter of law. The District Court's and Court of Appeals' rulings, rejecting the entrapment defense on these facts, are contrary to the evidence, and in conflict with decisions of this Court and of all the Circuits.[15]

Only by its conclusion that a predisposition to commit a financial crime defeats an entrapment defense as to a drug offense, can the Court of Appeals rationalize affirmance of defendant's conviction in this case. Such an unwarranted, unprecedented overextension of the

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[15] In addition to the afore-cited Circuit Court decisions finding entrapment as a matter of law, *cf.* the following decisions, each, reversing for instructional errors *re* entrapment in jury cases: *United States* v. *Oquendo,* 490 F.2d 161 (5 Cir. 1974) (where viable entrapment defense presented, error for court to instruct in terms of mere credibility choice between informant and defendant); *United States* v. *Watson,* 489 F.2d 504, 508-09 (3 Cir. 1973); *United States* v. *Timberlake,* 559 F.2d 1375 (5 Cir. 1977).

"predisposition" element of the entrapment defense portends serious consequences to the administration of criminal justice. In a society wherein impoverished Indians are entrapped into killing endangered eagles, see *Dion, supra,* we do not need to diminish the citizens' protection against overzealous government agents, by a holding which seriously undermines the entrapment defense, which is rooted in due process of law.

> "As Mr. Justice Brandeis put it, 'the government may not provoke or create a crime and then punish the criminal, its creature.'" *Lard, supra* at 1292, quoting from *Casey* v. *United States,* 276 U.S. 413, 423, 72 L.Ed. 632, 636 (1928).

Accordingly, certiorari should be allowed; and, upon a consideration of the merits, this Court should determine that, pursuant to application of the proper criteria respecting the "predisposition" element of the entrapment defense, the defendant in this case was, indeed, entrapped as a matter of law, irrespective of any witness credibility issues. See cases cited in fn. 3, p. i, *supra;* and see especially *United States* v. *Oquendo, supra* fn. 15.

By way of comparison, see the following cases, wherein convictions were affirmed on the basis of predisposition; the facts of each are worlds apart from those at bar: *United States* v. *Gunter,* 741 F.2d 151 (7 Cir. 1984); *United States* v. *Kaminski,* 703 F.2d 1004 (7 Cir. 1983); *United States* v. *Townsend,* 555 F.2d 152 (7 Cir. 1977).

This case presents an ideal vehicle for this Court to speak on the matter of entrapment, with special emphasis on predisposition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
KATHLEEN KELLER
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued January 28, 1986
June 25, 1986.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-2260 v.

NIKOLA KONSTANTINOV,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 CR 235
Hon. Marvin F. Aspen, *Judge*.

ORDER

After a one-day bench trial, the appellant, Nikola Konstantinov, was convicted of one count of violating 21 U.S.C. § 841(a)(1) by distributing .14 gram of heroin. He was sentenced to five years probation with the first six months in custody at the Metropolitan Correctional Center. On appeal, Konstantinov argues (1) that entrapment was established as a matter of law and (2) that the trial court improperly restricted cross-examination regarding the details of money paid to a government informant. For the reasons discussed below, we affirm.

I. FACTS

The only witnesses to testify at trial were appellant, Konstantinov, and Drug Enforcement Administration Special Agent, Marcellino Perez, Jr. The testimony revealed that on October 8, 1982, a government informant, known as "Carmen", who lived in the same building as Konstantinov, took Konstantinov and his wife to meet Agent Perez at a restaurant for lunch. "Carmen" had previously told Konstantinov that she wanted him to meet a man who had a great deal of money. The meeting lasted about thirty-five to forty-five minutes, and narcotics were discussed for about five minutes. Perez broached the subject of obtaining heroin. In the guise of a narcotics trafficker from Puerto Rico, Perez told Konstantinov that he was looking for a white heroin connection. Konstantinov informed Perez that he did not really deal with narcotics, but that he had a friend who was then in Europe who might be able to help Perez. Konstantinov said he would contact Perez when his friend returned. Perez also told Konstantinov that he had a large amount of money that he needed transferred out of the country[1] and that he had access to fifteen million dollars.

Perez and "Carmen" both talked with Konstantinov several times after the October meeting. At one point "Carmen" informed Perez that Konstantinov was going to deliver a sample of heroin to Perez. This information

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[1] This discussion of the laundering of drug money led to an incident on March 10, 1983, when Konstantinov introduced Agents Perez and Perry to Slabodan Pavlovic and the four discussed money laundering. *See United States* v. *Richter,* 610 F. Supp. 480, 483 (N.D. Ill. 1985). Ultimately, a seventeen-count indictment was handed down. Konstantinov was named in count one and count seventeen. Count one charged Konstantinov and three other defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *Id.* Count one was eventually dismissed. The seventeenth count was severed as improperly joined under Fed. R. Crim. P. 8(b) and is the subject of this appeal.

led to a meeting on November 19, 1982, when "Carmen" brought Perez to a building that Konstantinov was renovating. Two other men were present. Perez asked Konstantinov if he had obtained the sample "Carmen" had mentioned and Konstantinov said that he had not, but he expected his friend to return from Europe in about one week. Konstantinov then showed Perez a container containing white powder and asked Perez to identify the powder. Perez said that it looked like dusting powder used on cue sticks in pool halls.

Perez called Konstantinov three or four times after the November meeting asking for narcotics, but Konstantinov did not have any. On April 26, 1983, Konstantinov met with Perez and another agent in a car. The conversation was recorded and played for the court. On April 27, Perez called Konstantinov to arrange for the delivery of a sample. Konstantinov said that he was unable to contact his friend and that Perez should call him the next day. On April 29, Perez again called Konstantinov and arranged a meeting after Konstantinov said "I have got the sample for you."

Later on April 29, Konstantinov and Perez met outside a restaurant in Perez's car. Konstantinov gave Perez a package containing .14 grams of heroin with a 4.9% purity. Konstantinov told Perez that the sample was from the same friend that Konstantinov had previously mentioned and that he would try to arrange a meeting between Perez and his friend. Konstantinov did not ask Perez for any money and no money changed hands.

At some time within the next few days Perez came to see Konstantinov and told him that the heroin was not good. Konstantinov told Perez he had never bought anything like this before.

No further narcotics were delivered after April 29. Perez contacted Konstantinov around May 18 to arrange to meet Konstantinov's friend, but Konstantinov told him to call back because his friend was out of town. Perez said he would call in one week. Perez testified that the May con-

versation was the last he had with Konstantinov regarding narcotics because he was unable, after several attempts, to contact Konstantinov. Perez said that he had problems contacting Konstantinov because he was rarely home and often said he would be out of town for several weeks conducting business. Perez's later testimony, however, revealed that Perez spoke with Konstantinov on several occasions about narcotics, but Konstantinov told him that he was unable to contact the man and that he did not know where to reach him and had not seen him. Also, Perez called Konstantinov on March 15, 1984, the day of Konstantinov's arrest and almost one year after the delivery. In the March conversation Perez asked Konstantinov to obtain some narcotics and Konstantinov said that he would try to locate someone for him.

Konstantinov spoke in "broken English" at trial, but did not require an interpreter. Konstantinov testified that he had never before or after obtained narcotics for anyone. Konstantinov did not have a friend in Europe nor did he ever attempt to find a narcotics source. He kept telling Perez that he would help him to string him along and to get money from Perez's laundering activities. Konstantinov claimed he never intended to deliver narcotics, but only to wait until the money was in his possession, and then he planned to simply abscond with it. Konstantinov claimed that he had hoped to open a nightclub soon and needed money. Perez had told him that he had fifty million dollars and said many times that he would use Konstantinov to launder money. Konstantinov said he would help Perez by taking his money to Yugoslavia, Poland or Russia. Konstantinov had asked Perez for loans to complete repairs to a restaurant and had asked Perez to invest in his carpet business. Perez had said he would see about the loans.

Konstantinov alleged that he came into possession of the heroin when a "Mexican" man looking for a job came into the building he was renovating on April 25, 1982. The man first attempted to sell Konstantinov a ring and a watch; then the man said he had some heroin to sell and

gave Konstantinov a heroin sample. Konstantinov had never met this man before and did not know where to find him. The man told Perez he would return later and that he had two to three kilos. The man did not ask Konstantinov for any money and Konstantinov never opened the sample. Konstantinov claimed that his knowledge and understanding of the quality of the heroin was due to a conversation with the man who gave it to him. He used the word "rock form" in describing the heroin on the date of the delivery only because the man who gave it to him said they had a lot of heroin in that form. The man never returned nor did Konstantinov attempt to locate him.

The district judge rejected Konstantinov's testimony regarding the source of the heroin, finding the scenario without credibility. The judge also found the tape recording as indicative of a willing participant in a delivery of heroin. The court found that at the very least Konstantinov had delivered the heroin in order to con Perez out of a large amount of money.

II. ENTRAPMENT

The entrapment defense focuses on the intent or predisposition of the defendant to commit the crime. *See United States* v. *Russell,* 411 U.S. 423 (1973). Entrapment is established as a matter of law only when the absence of predisposition is apparent from the uncontradicted evidence. *United States* v. *Thoma,* 726 F.2d 1191, 1197 (7th Cir.), *cert. denied,* 104 S. Ct. 2683 (1984); *United States* v. *Kaminski,* 703 F.2d 1004, 1007 (7th Cir. 1983); *United States* v. *Spain,* 536 F.2d 170, 173 (7th Cir.), *cert. denied,* 429 U.S. 833 (1976). Among the factors relevant to determining predisposition are (1) the character or reputation of the defendant, including any prior criminal record; (2) whether the suggestion of criminal activity was initially made by the government; (3) whether the defendant was engaged in the criminal activity for profit; (4) whether the defendant evidenced reluctance to

commit the offense, overcome only by repeated government inducement or persuasion; and (5) the nature of the inducement or persuasion supplied by the government. *United States* v. *Perez-Leon,* 757 F.2d 866, 871 (7th Cir.), *cert. denied,* 106 S. Ct. 99 (1985). While none of the factors alone indicates either the presence or absence of predisposition, the most important factor is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated government inducement. *Id.*

Konstantinov argues that he was not predisposed to commit the crime, pointing out that this case involves a single delivery. Also Konstantinov had no prior record, and in fact, as Perez admitted in his testimony, he did not have a narcotic file at the drug agency. Nor did the government present any evidence of the character or reputation of Konstantinov from which the court below could have found predisposition. He also emphasizes that he derived absolutely no profit whatsoever from the single delivery. The record conclusively demonstrates that it was the government agent who initiated the unlawful activity. Also, it was only after several personal visits and numerous phone calls for an almost seven month period in which Perez continued to ask him whether he had found a drug source, that Konstantinov delivered the heroin. Further, the inducement offered by the government was the expectation of receiving a large amount of money. Konstantinov also argues the taped phone conversation does not show a detailed knowledge and understanding of narcotics dealings. In addition, despite repeated requests Konstantinov never again distributed narcotics or engaged in any other criminal act.

Viewing the evidence in the light most favorable to the government as we must, *Glasser* v. *United States,* 315 U.S. 60 (1942); *Perez-Leon,* 757 F.2d at 871, it is apparent that the judge was presented with specific evidence contra-

dicting Konstantinov's claim that he was not predisposed to distribute heroin. Perez did initiate the delivery, but mere solicitation by itself does not establish entrapment. *See Perez-Leon*, 757 F.2d at 872; *United States* v. *Rodgers*, 755 F.2d 533, 550 (7th Cir.), *cert. denied*, 105 S. Ct. 3532 (1985); *United States* v. *Gunter*, 741 F.2d 151, 154 (7th Cir. 1984). Konstantinov himself admitted that he told Perez during their very first meeting that he would contact his friend regarding narcotics when he returned from Europe. *See United States* v. *Garcia*, 562 F.2d 411, 416 (7th Cir. 1977) (the fact defendant admitted that he told the informer during their first meeting that he could write to sources in Mexico to obtain heroin was specific evidence contradicting defendant's claim that he was not predisposed to deal in heroin.) This fact distinguishes the present case from *United States* v. *Lard*, 734 F.2d 1290 (8th Cir. 1984), which defendant relies upon extensively to support his claim of entrapment. In *Lard*, the defendant expressed initial reluctance to engage in criminal activity. *Id.* at 1295. In this case, Konstantinov never refused to become involved; every time he was asked he said he would help Perez find heroin and he ultimately did. Although Konstantinov claimed he lied about a source and his intentions to help Perez "[p]redisposition is a question of intent, not experience, and to the extent defendant engaged in puffery . . . this only serves to bolster a finding that he was predisposed . . ." *Kaminski*, 703 F.2d at 1009.

Moreover, this was a bench trial and the district judge did not believe Konstantinov's testimony regarding the source of the heroin. The district judge found that the tape recorded conversation showed Konstantinov a willing participant in the delivery of heroin. Credibility determinations remain with the trier of fact even in entrapment cases. *Garcia*, 562 F.2d at 415, *citing Masciale* v. *United States*, 356 U.S. 386 (1958); *United States* v. *Navarro*, 737 F.2d 625, 636 (7th Cir.), *cert. denied*, 105 S. Ct. 438 (1984).

The defendant indicated that it was the hint of big money which induced him into procuring the heroin. The offer of a reasonable inducement is a proper means of investigating crime. *United States* v. *Belzer*, 743 F.2d 1213, 1218 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 788 (1985). A large inducement is not proof in and of itself that a defendant was not predisposed to commit the offense and becomes of minimal importance where a defendant agrees to commit the crime before knowing the amount of the reward. *See Kaminski*, 703 F.2d at 1008. In this case, Konstantinov did not participate in the distribution solely to help a close friend resolve his drug or money problems. *See e.g. United States* v. *McLernon*, 746 F.2d 1098, 1114 (6th Cir. 1984). Instead, he testified that he was motivated by the hope of stealing the money from the laundering operation. The fact that Konstantinov was motivated by greed and unconcerned about breaking the law does not lead to the inference that he was an "unwary innocent", *Sherman* v. *United States*, 356 U.S. 369, 372 (1958), initially refusing to involve himself in criminal activities.

Finally, the defendant's characterization of the heroin as "rock form" does indicate a knowledge of the quality of heroin. Konstantinov claims that the man who gave him the heroin described it in this manner, but the district judge rejected his story as incredible. In sum, given all this, and given also the limited scope of review in this court of findings of fact and credibility determinations of the district court, there was sufficient evidence upon which the district judge could find, beyond a reasonable doubt, defendant's predisposition to commit the offense for which he was charged. This is an unusual case involving several close questions, but considering all the circumstances as well as the deference to be accorded the district court as trier of fact, we cannot find reversible error.

III. RESTRICTION OF CROSS-EXAMINATION

Konstantinov argues that he was deprived of his Sixth Amendment right of confrontation and his constitutional right to present defense evidence because the trial judge unduly limited his cross-examination of Perez regarding the one thousand three hundred dollars "expenses" paid to "Carmen", the government informant. The defense attorney asked Perez on cross-examination what expenses Carmen had incurred, other than the use of her car. The court sustained an objection because the informant was not testifying and was not present on the relevant date. Thus, Konstantinov contends that he was precluded from establishing possible outrageous government conduct, *see United States* v. *Russell,* 411 U.S. 423, 431-32 (1973), in that "Carmen" may have been the kind of forbidden, contingent-fee informer whose participation is a bar to a valid conviction.

Konstantinov cites as authority for this argument *Williamson* v. *United States,* 311 F.2d 441 (5th Cir. 1962), in which the United States Court of Appeals for the Fifth Circuit reversed a conviction in which the informant used by the government was paid on a contingent fee to produce legally admissible evidence against certain targeted defendants. The Fifth Circuit was concerned that such an arrangement might tend to a "frame up" or cause an informant to induce or persuade innocent persons to commit crimes which they had no previous intent to commit. *Id.* at 444. Konstantinov's reliance upon *Williamson* is misplaced. In *Williamson,* the informant made the purchase from one of the defendants and produced evidence against both defendants. *Id.* at 444-45. In this case, Agent Perez alone witnessed and participated in the transaction which was the basis for the charge. The real issue was not the credibility of "Carmen". "Carmen" did not testify at trial and was not quoted as a hearsay declarant. The only testimony regarding "Carmen" merely describes the first two arranged meetings between Perez and Konstantinov. Thereafter, the informant played a decidedly unobtrusive role in the course of events leading up to the delivery.

The trial court has broad discretion over matters pertaining to the relevancy and admissibility of evidence as well as the extent and scope of cross-examination. *United States* v. *Pizarro,* 717 F.2d 336, 347 (7th Cir. 1983). There is no evidence that the informant or anyone connected with the government supplied the heroin. Moreover, the defendant does not rely upon his relationship with the informant as inducing him to deliver the heroin. He did not attempt to call the informant as a witness, adverse or otherwise, in order to substantiate his story, nor did the government. Therefore, the informant's expenses were not relevant.

Additionally, Konstantinov's assertion that a conviction cannot stand if it is based upon participation by a government informant paid on a contingent fee basis to "set up" a particular individual, is incorrect. The Fifth Circuit itself has "confined *Williamson* to a narrow set of circumstances." *United States* v. *McClure,* 577 F.2d 1021, 1022 (5th Cir. 1978). Factors that militate against the application of *Williamson* include the situation where the agent, not the informant, made the buy. *United States* v. *Jenkins,* 480 F.2d 1198, 1199 (5th Cir.) (per curiam), *cert. denied,* 414 U.S. 913 (1973). Furthermore, this Court has declined to adopt a *per se Williamson* rule that all contingent fee arrangements with informants are invalid. *See United States* v. *Hodge,* 594 F.2d 1163, 1167 (7th Cir. 1979) (the method of payment is properly a matter for the trier of fact to consider in weighing the credibility of the informant). In this case, unlike *Williamson,* there was no likelihood that Carmen fabricated evidence in order to convict an innocent person and collect her fee.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 13, 1986.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-2260 vs.

NIKOLA KONSTANTINOV,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 CR 235

Marvin F. Aspen, *Judge*.

ORDER

On consideration of the petition for rehearing filed by the appellant in the above-entitled cause, all judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.